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KUMPULAN PROTECTION SDN BHD v. GLOBAL GLOBE (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KHADIJAH IDRIS JC
[COMPANIES WINDING-UP PETITION NO: 28NCC-353-05-2015]
B 11 APRIL 2016

CIVIL PROCEDURE: *Judgments and orders – Consent judgment – Parties mutually entered into consent judgment to pay judgment sum – Failure of debtor to comply with consent judgment – Allegation that consent judgment erroneously entered – Whether consent judgment entered into willingly and consciously – Whether debtor indebted to creditor*

C

COMPANY LAW: *Winding up – Petition – Petition to wind up – Intitulement in petition did not specify provision of law on which petitioner was relying on – Whether petition irregular or defective – Whether fatal – Whether there are statutory requirements requiring specific reference to provision of law – Companies Act 1965, s. 218*

D

The petitioner and the respondent had agreed to settle a monetary claim by the former against the latter at the Sessions Court. The parties entered into
E a consent judgment where it was mutually agreed that the respondent was to pay the judgment sum in ten equal monthly instalments. However, the respondent failed to comply with the consent judgment. The petitioner served a notice under s. 218 of the Companies Act 1965 ('the Act'), demanding the respondent to pay the judgment sum, which the respondent
F neglected. The petitioner filed the present petition, seeking an order that the respondent be wound up. In opposing the petition, the respondent submitted that, *inter alia*, (i) the consent judgment was erroneously entered because there was no privity of contract between both parties and as such, the respondent was not indebted to the petitioner; (ii) the winding up
G proceedings, which were based on the consent judgment, were untenable; and (iii) the petition was irregular because the intitulement did not specify the correct provision of the law, namely s. 218(1) and any of the limbs from (a) to (h), on which the petitioner was relying on. Since winding up proceedings are highly technical and penal in nature, the respondent submitted that any irregularity or defect is fatal. The issues which required
H the court's consideration were whether the petition was defective on the grounds that (i) technical defect, namely the intitulement, did not specify the correct provision of the law on which the petitioner was relying on; and (ii) the consent judgment which formed the basis of the basis of the petition was a genuine mistake.

I

Held (allowing petition):

(1) The intitulement to the petition presented by the respondent did not make specific reference to any of the subsections under s. 218(1) of the Act which provides for various circumstances in which a company may be wound up. However, the Act and the Companies (Winding-up) Rules 1972 do not require the specific subsection of s. 218 be stated in the intitulement of a winding up petition. Since there is no statutory requirement to do so, the petition was not defective. The respondent was not placed in a disadvantaged position or prejudiced by mere omission, in the intitulement, of the specific provision of s. 218 of the Act. The petition must be read as a whole and not in isolation so as to give the petition the due effect it so deserved. The petitioner's petition had set out the primary facts and vital exhibits were attached to the petition. (paras 21, 27, 30 & 33)

(2) The respondent was represented by a legal counsel at the Sessions Court and it could be concluded that the consent judgment was entered into willingly and consciously by the respondent. The petition was not concerned with the merits of the consent judgment. It did not matter even if the respondent had filed a fresh suit to set aside the consent judgment. What mattered was the petitioner, as a creditor, pursued its right to recover the judgment sum from the respondent, as a debtor, pursuant to a notice issued under s. 218 of the Act. The respondent did not adduce evidence to rebut the insolvency presumption even though it said it was solvent and had financial viability to pay. Under such circumstances, the presumption remained and the court was empowered to exercise its discretionary power to wind up the respondent. (paras 39, 40 & 44)

Case(s) referred to:

Au Yuan Chee v. Lim Leong Thaim & Ors [1956] 2 MC 260 ***(refd)***

Cheow Chew Khoon @ Teoh Chew Khoon (yang berniaga sebagai Cathay Hotel) v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 CA ***(refd)***

Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd [2010] 8 CLJ 775 CA ***(refd)***

Ho Siew Choong & Ors v. Everworth Sdn Bhd [2005] 2 CLJ 273 HC ***(refd)***

Juara Aspirasi (M) Sdn Bhd v. Tan Soon Ping [2011] 1 LNS 1952 CA ***(refd)***

Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd [2000] 2 CLJ 160 CA ***(refd)***

Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***

Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(refd)***

Petro-Pipe Industries (M) Sdn Bhd v. Fieldwork Engineering Sdn Bhd [2003] 1 CLJ 777 HC ***(refd)***

Public Bank Bhd lwn. Search Realty (M) Sdn Bhd [2001] 1 LNS 272 HC ***(foll)***

Sungei Rinching Sdn Bhd v. Sri Keluarga Sdn Bhd [1996] 3 CLJ 44 CA ***(refd)***

Wong Thai Kuai & Anor v. Kansas Corporation Sdn Bhd [2007] 3 CLJ 263 HC ***(dist)***

Legislation referred to:
Companies Act 1965, ss. 218(1)(a), (b), (c), (d), (e), (f), (g), (h), (2)(a), (b), 221
Rules of Court 2012, O. 7 r. 2(1A), O. 14
Rules of the High Court 1980, O. 7 r. 2(1A), O. 28, O. 89
Companies (Winding-up) Rules 1972, rr. 8, 22, 32(1), First Schedule

For the petitioner - JY Kuah; M/s Ming, Yee & Co
For the respondent - Ragumaren Gopal; M/s G Ragumaren & Co

Reported by Najib Tamby

JUDGMENT

Khadijah Idris JC:

[1] The petitioner, Kumpulan Protection Sdn Bhd (No. Syarikat 106999-X) and respondent, Global Globe (M) Sdn Bhd (No. Syarikat 556853-V) are both private company incorporated under the Companies Act 1965 (Act 125).

[2] On 11 May 2015 petitioner presented a petition *vide* 28NCC-353-05-2015 ("petition") for the respondent to be wound up in accordance with Act 125 and for the official receiver to be appointed as provisional liquidator.

[3] On 5 February 2016 after hearing submission from both parties, this court made an order in terms of the prayer in the petition. The respondent appealed against the order.

Factual Background

[4] On 21 August 2014 the petitioner and respondent agreed to settle a monetary claim made by the petitioner against the respondent in Suit No. A52C-9-02-2014 at the Kuala Lumpur Sessions Court ("KLSC suit") for the amount RM128,911.26 ("judgment sum"). Both parties had mutually agreed for the respondent to pay the judgment sum in ten equal monthly instalments in the sum of RM12,891.12 each beginning 30 September 2014 and ending on 30 June 2015 as full and final settlement of the amount claimed by petitioner. Pursuant thereto a consent judgment was recorded on 21 August 2014. ("consent judgment" - see encl. 10 exh. "CYC 1").

[5] Due to respondent's failure to comply with the consent judgment, the petitioner served a notice under s. 218 of the Act 125 demanding respondent to pay the judgment sum together with interest of 5% per annum on the said sum from 30 November 2014 to date of full realisation and costs within 21 days from the date of receipt of the said notice.

[6] The respondent neglected to pay or satisfy the judgment sum demanded or any part thereof or to make any offer to secure or compound the said sum within the stipulated period.

[7] By reason of the respondent's failure, the respondent is deemed insolvent and unable to pay its debt and as such the petition was presented, seeking for an order that the respondent be wound up.

[8] Respondent opposed the petition. In essence the respondent's case (encl. 9) is that the consent judgment was erroneously entered because there was no privity of contract between both parties. As such the respondent is not indebted to the petitioner. Respondent further argued even if respondent is liable to the petitioner, the judgment sum is not due. Under the circumstances the winding up proceedings which is based on the consent judgment is untenable.

[9] The facts related by the respondent in encl. 16 in support of their contention that the consent judgment was a mistake is as follows:

(a) *vide* a letter of award dated 10 February 2010, respondent appointed one Dinamik Jana as a subcontractor to execute services works ACMW, fire protection services, kitchen equipment and LPG system for a project known as "Cadangan Pembangunan yang Mengandungi Ibu Pejabat dan Dewan Besar LKIM di atas PT 1118 dan PT 1119 Mukim Dengkil, Daerah Sepang, Selangor Darul Ehsan ("contractual works wontract") worth RM9,807,162. Subsequently both parties executed an agreement in respect of the contractual works on 15 March 2010;

(b) thereafter *vide* letter of award of the same date, Dinamik Jana appointed the petitioner as a subcontractor to execute works in respect of fire protection system under the contractual works contract. The value of the said contract is RM1,165,000;

(c) according to petitioner, though they are appointed by Dinamik Jana to execute works of the fire protection system, Dinamik Jana had by letter dated 23 December 2009 (encl. 9 exh. "ZBR 9") informed petitioner that Dinamik Jana "... shall irrevocably authorised Global Globe (M) Sdn Bhd to make direct payment to you for all verified and true claims by you against us ...".;

(d) *vide* letter dated 25 May 2013 to the respondent, petitioner submitted a claim for payment outstanding in the amount of RM128,911.26 for works done (encl. 9, exh. "ZBR 9");

(e) further thereto, Petitioner issued another letter dated 4 November 2013 (encl. 10, exh. "CYC 4", also found in encl. 9, exh. "ZBR 9") to the respondent requesting for remittance of the amount RM128,911.26. One Hanis Abdul Rahman had, on behalf of the respondent on 8 November 2013, acknowledged in writing on the said letter that the said amount is outstanding and owing to the petitioner;

(f) respondent failed to pay the said sum which prompted the petitioner to file the KLSC suit. In their statement of defence, respondent disputed the claim and denied owing such sum. It is to be noted that facts relating to privity of contract was not pleaded in the respondent's statement of defence (encl. 9 exh. "ZBR 4"). The respondent merely denied it is indebted to the petitioner for the judgment sum;

(g) petitioner filed for summary judgment under O. 14 of the RHC 2012. It is in the affidavit opposing the summary judgment did the respondent raised the issue of privity of contract. Respondent also contended Hanis Abdul Rahman who had acknowledged the sum as outstanding and owing was a general clerk and was not authorised to do so on behalf of the respondent. Respondent further stated the letter dated 4 November 2013 (encl. 10, exh. "CYC 4", also found in encl. 9, exh. "ZBR 9") is not in their records;

(h) before O. 14 application was heard, parties had agreed to settle the matter and the consent judgment was recorded. Respondent having failed to comply with the consent judgment and thereafter the statutory notice under s. 218 of the Act 125, the petitioner initiated winding up proceeding on May 2015;

(i) on 11 August 2015 respondent received a letter from Maju Integrated Consultant (encl. 9, "exh. ZBR-11") informing certain works under the fire protection system contract was not completed by the petitioner;

(j) respondent then filed an action, Suit No. A52C-44-10-2015, in the Sessions Court on 9 October 2015 to set aside the consent judgment and an application to stay and stop the effect of the consent judgment. On 1 December 2015 the Sessions Court granted a stay of the execution of the consent judgment;

(k) in opposing the petition (encl. 9), respondent forwarded the same ground it opposed the petitioner's application for summary judgment in the KLSC suit, namely, no privity of contract between petitioner and respondent. In addition to that the respondent now said, after receiving letter from Maju Integrated Consultant and upon perusal of the contractual works contract document, the respondent realised the judgment sum is part of the retention money which they have yet to received. According to the respondent the retention money has yet to be released to the respondent because certificate making good defects (CMGD) has not been issued. The respondent further argued the CMGD has not been issued because there are some repair works which petitioner needs to complete. Under the circumstances respondent argued the sum RM128,910.26 is not due to the petitioner because of some unfinished works which petitioner need to do. As such respondent's agreement to enter into the consent judgment to agree to pay the judgment sum was a mistake;

(l) further thereto on 18 December 2015 the respondent applied, *vide* encl. 16, for an order that the winding up petition filed against it by the petitioner be stayed. The application was made pursuant to s. 221 of the Act 125 and/or under the inherent jurisdiction of this court. In support of the stay application, the respondent adopted the affidavit opposing the petition and argued that if the petition is not stayed respondent would suffer grave injustice should the respondent succeeded in setting aside the consent judgment. Having heard both parties' submission, this court dismissed encl. 16 with cost and proceeded to hear the petition. Order in terms of the petition was granted on 5 February 2016.

Petitioner's Submission

[10] Petitioner's counsel submitted the allegations by respondent that the consent judgment was a mistake is a matter to be dealt by the Sessions Court in respondent's writ action and not by this winding up court. This court should only be concerned with the ability of respondent to settle the debt due and owing to the petitioner.

[11] In respect of the genuine mistake alleged by respondent, petitioner submitted that the respondent was at all material times represented and had sought legal advice in respect of the KLSC suit and that they are aware of or have knowledge on all documents, correspondences between parties and the cause papers filed in the KLSC suit. When the consent judgment was recorded, the respondent was represented and properly advised by their solicitors and therefore should understood their rights at all material times. In any event petitioner argued the winding up proceeding is not an execution proceeding based on the consent judgment but the inability of respondent to pay its debt.

[12] Petitioner contended that the petition is in order because a registrar's certificate was issued. Respondent did not, at all material times, dispute it. Failure by respondent to comply with the statutory notice (issued pursuant to s. 218(2)(a) has given rise to a statutory presumption the respondent is insolvent and/or unable to pay all existing debts owing to all its creditors. This presumption remains as it was not and/or never rebutted by the respondent.

Respondent's Submission

[13] Counsel for respondent contended since there is no privity of contract between respondent and petitioner, petitioner has no right to sue the respondent in the KLSC suit.

[14] Alternatively if privity is established, respondent contended there is no monies due and therefore no debt due. Under the circumstance there cannot be a creditor/debtor relationship between petitioner and respondent.

A The issue of respondent's inability to pay its debt does not arise. So does the issue of insolvency. Based on the foregoing, respondent's counsel contended the presumption that the respondent is unable to pay its debt is rebutted.

[15] The respondent also contended the petitioner has failed to prove the respondent is unable to pay its debt. Respondent further contended it is B solvent and has financial viability to pay whatever legitimate claims against the respondent.

[16] As regards to the petition, respondent submitted it is irregular because the intitulement does not specify the correct provision of the law, namely s. 218(1) and any of the limbs from (a) to (h), on which the petitioner is C relying on. Since winding up proceedings are highly technical and penal in nature, any irregularity or defect is fatal.

Issue

[17] In essence the issue which requires consideration is whether the D petition is defective on the following ground:

(a) technical defect, namely the intitulement did not specify the correct provision of the law on which the petitioner is relying on; and

(b) the consent judgment which forms the basis of the petition was a genuine E mistake.

Reasons

Whether Petition Is Defective Because Intitulement Does Not Specify The Correct Provision Of The Law On Which The Petitioner Is Relying On

F **[18]** It is to be noted the respondent did not, in any of its affidavit (including affidavit opposing the petition), raised the technical defect issue. The petitioner had, in its affidavit in reply affirmed by its managing director (encl. 10) averred at para. 8(ii) that the respondent has failed to raise any technical defect in the petition. Respondent *vide* its director responded in its G affidavit (encl. 11, para. 6) and averred that the petition was defective because the consent judgment was erroneous and under that circumstance there is no debt due to respondent. Even though the respondent was provoked to find technical fault with the petition, it did not raised any then. Nevertheless the technical defect issue will be discussed in the following H paragraphs.

[19] The Companies (Winding-up) Rules 1972 ("Winding-up Rules") made under the Companies Act 1965 (Act 125) and Courts of Judicature Act 1964 (Act 91) regulates the proceedings and procedure in relation to winding up of companies. Rule 22 of the Winding-up Rules requires petition for the I winding up of a company may be either in form 2 or 3 of the First Schedule, with such variations as circumstances may require. For the purpose of this

instant case, form 2 is relevant. Rule 8 of the Winding-up Rules requires every proceeding in a winding up matter to be dated and shall, with any necessary additions, be intituled as follows:

IN THE HIGH COURT IN ... AT ...

COMPANIES (WINDING-UP) NO ... OF ...

In the matter of the Companies Act, 1965

and

In the matter of ...

[20] The intitulement to the petition as evidenced in encl. 1 is as follows:

In the matter of GLOBAL GLOBE (M) SDN BHD (Company No: 556853-V)

AND

In the matter of Section 218 of the Companies Act, 1965

BETWEEN

KUMPULAN PROTECTION SDN BHD

(Company No: 106999-X)

... PETITIONER

AND

GLOBAL GLOBE (M) SDN BHD

(Company No: 556853-V) ... RESPONDENT

PETITION

...

[21] It is indeed true that the intitulement to the petition presented by respondent did not made specific reference to any of the subsections under s. 218(1) of the Act 125 which provides for various circumstances in which a company may be wound up. In this respect it must be noted however that Act 125 and the Winding-up Rules do not require the specific subsection of s. 218 to be stated in the intitulement of a winding up petition.

[22] Nevertheless the respondent submitted it is mandatory and the failure to do so is fatal. In this respect, respondent referred this court to *Ho Siew Choong & Ors v. Everworth Sdn Bhd* [2005] 2 CLJ 273 where it was held if the statutory notice had made reference to a non-existent subsection, it will be fatal. In that case the statutory notice issued by the petitioner had made reference to s. 218(1)(e) and (f) of the Act 125, which does not exist. The

court held the petitioner had failed to specifically state the correct position. It was further held since the petition was founded on the statutory notice under s. 218 of the Act 125, any defect in that notice was fatal and the statutory notice could not be used as a foundation to launch a petition. The defect was prejudicial to Everworth Sdn Bhd as it was put in the disadvantage of having to phantom whether to limit its reply in respect of the statutory demand under s. 218(1) of the Act 125 which provide different circumstances in which a company may be wound up or to answer to the other matters under s. 218(2)(b) of the said Act. In that case His Lordship Apandi Ali J (as he then was) referred to two earlier cases which dealt with similar issue:

(a) In *Sungei Rinching Sdn Bhd v. Sri Keluarga Sdn Bhd* [1996] 3 CLJ 44, Court of Appeal held a statutory notice under s. 218(2)(a) of the Act 125 which demanded a judgment sum together with interest and costs but did not specify the amount of costs payable by the company was held to be valid. This was because the sum demanded was the same amount as in the original judgment and therefore there was no dispute as to the sum owed and that the company was clearly not in any way misled in that respect; and

(b) In *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd* [2000] 2 CLJ 160, the Federal Court held a notice under s. 218(2)(a) of the Act 125 need not specify the exact sum due as at the date of the demand. So long as the sum due exceeds RM500 and remain unpaid after a demand has been made there is neglect to pay such sum within the meaning of s. 218(2)(a) Act 125. The Federal Court endorsed the Court of Appeal decision that the failure to quantify the actual sum due in the s. 218 notice did not render the demand invalid. In this respect the facts in *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagang Sdn Bhd* case is similar to the facts in the instant case, namely, the claim made in the statutory notice was in respect of a judgment debt. Petronas Dagang Sdn Bhd had obtained a judgment in default of appearance for a sum of RM334,118.79 (together with interest at the rate of 8% per annum from 28 October 1998 until date of payment) against Malaysia Air Charter Company Sdn Bhd.

[23] It must be noted the primary issue dealt by the court in the three cases above was the validity of a statutory notice issued under s. 218 of the Act 125, and not the petition. The fact that a winding up petition is founded on a statutory notice it is therefore pertinent as illustrated in the three cases cited above, to ensure the statutory notice is legally proper to avoid challenge on the statutory notice so as to avoid consequential challenge on the petition itself. As the statutory notice under s. 218 of the Act 125 forms the basis of a petition, one will have to peruse the contents of the petition as a whole and not read its headings or intitulement in isolation to determine whether the statutory notice and/or the petition is defective. The statutory notice served on the respondent will be discussed later.

[24] Respondent cited *Wong Thai Kuai & Anor v. Kansas Corporation Sdn Bhd* [2007] 3 CLJ 263; [2007] 4 MLJ 33 where it was held failure and/or omission on the part of the petitioners to state in its intitulement under which limb of s. 218 of the Act 125 the petitioner was moving the court is fatal and that was one of the reason on which the petition was dismissed. His Lordship Ramly Ali J (as he then was) referred to the decision of Court of Appeal in *Cheow Chew Khoon @ Teoh Chew Khoon (yang berniaga sebagai Cathay Hotel) v. Abdul Johari Abdul Rahman* [1995] 4 CLJ 127; [1995] 1 MLJ 457 as follows:

> **An originating process requiring an intitulement** must state, with sufficient particularity, either **in its heading or in its body**, the statute or rule of court under which the court is being moved, otherwise it would be an embarrassing pleading and liable to be struck out…
>
> Further, the court held that:
>
> The summons does not … state any particular rule of court in its intitulement. Now, I think that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court, it would be a mockery of the principle that **there must be no surprise in civil litigation** …
>
> (emphasis added)

[25] It must be noted *Wong Thai Kuai*'s case was decided on its facts, in particular the claim made against the respondent was in respect of a disputed sum. As such it is vital for the specific limb under s. 128 of the Act 125 be cited in the intitulement. Whereas in this instant case the petition was grounded on a demand made in respect of a judgment debt the sum of which was clearly stated in the statutory notice served on respondent and very much within the respondent's knowledge. It is not a disputed sum.

[26] It is appropriate at this juncture to look at the brief relevant facts in *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari Abdul Rahman* for this court to appreciate the context and significance of the Court of Appeal decision, in particular with reference to the paragraphs quoted above. In that case the respondent took out an originating summons claiming vacant possession purportedly under O. 89 of the Rules of the High Court 1980 of a premise where he is the registered proprietor. The originating summons intituled generally in the Rules of the High Court 1980 and does not specify

under which order of the Rules of the High Court 1980 was the court moved. The appellant's case - he was a tenant holding over and as such O. 89 is not applicable. The respondent was of the view the originating summons is not under O. 89 since it also seek other reliefs. Respondent contended the application is under O. 28 for vacant possession. Plaintiff's failure to specify the relevant provision had unduly forced the court to scrutinise the originating summons and hear the parties' submission before it could determine the relevant provision under which the court was moved. Order 7 r. 2(1A) of the Rules of the High Court 1980 (repealed by Rules of Court 2012 but O. 7 r. 2(1A) remain the same) requires every originating summons to state in its intitulement the specific statutory provision under which the court is being moved. Thus the remark made by Court of Appeal as quoted above. Based on *Cheow Chew Khoon* case, the relevant specific provision must be stated with sufficient particularity either in its heading or body the statute or rule of court under which the court is being moved. The reason being - to give fair and proper notice to the other party for purposes of preparing his case in order to avoid surprise and the pleadings from being struck off.

[27] The Winding-up Rules do not require the specific statutory provision under which the court is moved to be stated in the intitulement of a winding up petition. Since there is no statutory requirement to do so, on that reason alone I am of the view the petition is not defective. Assuming for a moment the petition is defective, is the respondent placed in a disadvantage position or prejudiced or miscarriage of justice was occasioned on the respondent? I am of the view the respondent is not placed in such a position and my reasons are as discussed below.

[28] Close scrutiny of the petition (encl. 1) shows that it had followed strictly form 2 of Winding-up Rules as far as providing information and details about the company, namely, its registered office, capital, objects and importantly the circumstances which led to the issuance of the petition. This information is found at para. 5 where specific reference was made to the statutory notice issued pursuant to s. 218 of the Act 125 by the petitioner's solicitor and served on the respondent. The statutory notice was in fact attached to the petition as exh. "A-2". Upon perusal of the statutory notice dated 6 April 2015, its content is as follows:

(a) the demand made was in respect of a judgment debt ie a specific amount of RM128,911.26 together with interest at 5% pa on the said sum from 30 November 2014 until date of full realisation and cost pursuant to the consent judgment dated 21 August 2014 was made;

(b) respondent was required to pay the sum together with interest within 21 days from date of receipt of the notice; and

(c) failure by respondent to pay within the specified time is deemed to be unable to pay the debt and winding up action will be taken against the respondent.

[29] It can be seen that the statutory notice issued by petitioner has all the prerequisites of a valid and good notice in the context of s. 218 of the Act 125. This good notice is part and parcel of the petition. For all intent and purposes the petition has complied, with the necessary variations, with form 2 of the First Schedule of the Winding-up Rules. The respondent is put to notice of the claim made by the petitioner, namely a judgment debt which, up to the date of the presentation of the petition remain unsatisfied.

[30] It is therefore my considered opinion that the respondent is not placed in a disadvantaged position or prejudiced by mere omission, in the intitulement, of the specific provision of s. 218 of the Act 125. I am also of the view such omission cannot be said to have caught the respondent by surprise because the petition sets out the primary facts and vital exhibits are attached to the petition. It tells all that need to be told. Unless the respondent for reasons best known to them choose only to read the intitulement and ignore the rest of the content of the petition, then they do it at their own peril. For that they cannot now put the blame on the intitulement.

[31] For all intent and purposes the petition, read together with the statutory notice, had properly and adequately put the respondent to notice of the demand in respect of the judgment debt which was due and presently owing to the petitioner. The respondent was also put to proper and adequate notice of the consequences of its failure to pay within the stipulated period, namely, it shall be deemed to be unable to pay its debt and a winding up action is inevitable. As such it cannot be said that the failure to cite the specific provision under s. 218 of the Act 125 in the intitulement was so fatal that it had prejudiced the respondent to the effect the respondent was not able to fathom the necessary action or reply towards the petition.

[32] It is noted the respondent did not demonstrate how such omission is fatal to them. The respondent also did not, at any time during the proceeding, challenge the validity of the statutory notice. It is clearly an afterthought on the part of the respondent to raise technical defect in a last minute attempt to find fault with the petition for purposes of it being strike out.

[33] Based on the premise, I am of the view there is no technical defect in the petition. A winding up petition is not solely about the intitulement, because there are other part of a petition which provide details which must be given due attention, especially so in a winding up petition which has drastic consequences on a company. Therefore the petition must be read as a whole and not in isolation so as to give the petition the due effect it so deserved. As I have stated above, the omission to specify the relevant

provision of s. 218 is not a technical defect. Even if such omission is considered as technically defective for want of clarity in the intitulement, based on the reasons adumbrated above, it is my considered opinion the defect is not fatal.

[34] Petitioner's counsel submitted there is nothing wrong with the petition because the Registrar had issued a certificate to certify the requirements under r. 32(1) of the Winding-up Rules had been complied with (Registrar's certificate). It must be noted a certificate under r. 32(1) of the Winding-up Rules is not conclusive and may be set aside if the certificate is issued not in the manner required by the Winding-up Rules. This principle was established in *Ho Siew Choong & Ors v. Everworth Sdn Bhd* and *Petro-Pipe Industries (M) Sdn Bhd v. Fieldwork Engineering Sdn Bhd* [2003] 1 CLJ 777. The courts in those cases have held the issuance of a Registrar's certificate did not prevent the court from finding that there was no due compliance with the said r. 32(1) by the petitioner. As I do not accept the respondent's argument that the petition is defective for not specifically stating the exact provision of s. 218, the issue of the validity of the Registrar's certificate does not arise.

Petition Defective Due To Erroneous Consent Judgment

[35] I now move on to respondent's contention in respect of the genuine mistake alleged (see para. 11 above for respondent's position). At the outset it is important to bear in mind that winding up proceedings is not an execution proceedings. Her Ladyship Zaleha Zahari CAJ (as she then was) in delivering the decision of Court of Appeal in *Juara Aspirasi (M) Sdn Bhd v. Tan Soon Ping* [2011] 1 LNS 1952 referred to *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787:

> In Pewira *Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787; [2004] 3 MLJ 253 @ 265 Abdul Hamid Mohamad FCJ (as he then was) in delivering the decision of the Federal Court held that a bankruptcy proceeding is not a writ of execution, which was a continuation of the existing proceeding to enforce the judgment provided by the same rules of court, ie, the Rules of the High Court 1980. Bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt, and the object being to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with the loss of control over his properties to the Official Assignee. The fact that it is based on a judgment does not necessarily make it a continuation of the existing proceedings. It is a proceeding by way of petition just like divorce, winding up or election to name a few, bears the characteristics of a fresh proceeding unlike an execution proceedings. This principle is equally applicable to winding up proceedings.
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> In *Re A Company* [1915] 1 Ch 520, the question before the Court of Appeal was whether the execution on a judgment included the petition of winding-up of a company. Lord Cozens-Hardy MR said at p. 525:

> … Now 'execution on the judgment' is a technical term. It is a legal process by which the judgment creditor, in that character and for his sole benefit, by a proceeding in the same action seeks to satisfy his judgment wholly or partially. I think it is plain that a winding up petition is not execution on a judgment. It lacks almost every element of such an execution.

[36] In *Juara Aspirasi*, the petitioner issued a notice to the respondent demanding payment of a sum in respect of which judgment was obtained against the respondent. The court held, *inter alia*, even if there was an *ad interim* stay of the court order in place, there was no legal impediment for the petitioner to file a winding up petition against the respondent as bankruptcy and winding up proceedings was not within the ambit and meaning of "execution" proceedings as provided under the Rules of Court 2012.

[37] In *Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd* [2010] 8 CLJ 775 petitioner obtained a court order against respondent for the release and refund of a certain amount of trust money. Premised upon the court order the petitioner served a notice under s. 218(1)(e) of the Act 125 on the respondent. The Court of Appeal held:

> It is legally impossible for the respondent to challenge the validity of the court order dated 3 June 2005 in the winding up proceedings. If high authority is required for this simple proposition, the case of *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 CLJ 155; ([1988] 1 CLJ (Rep) 277), SC, a decision of Lee Hun Hoe CJ (Borneo) should be referred to. There at p. 157 (p. 279), His Lordship had this to say:
>
> > In the exercise of this jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the court could not go behind the judgment. See *In re Easton* [1893] 10 Mor 111; 9 TLR 409. Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings.
>
> In the same vein, Steve Shim J (later Chief Judge, Sabah & Sarawak) in *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (Administratrix of the estate of Mohamad Shariff bin Haji Hussain)* [2000] 1 LNS 197; [2000] 6 MLJ 155, had this to say at p. 158 of the report:
>
> > It is trite law that an order, even if irregular, is valid and enforceable until set aside. This principle is particularly relevant in bankruptcy proceedings where the court generally will not look behind the judgments or order save in very limited circumstances of fraud or illegality, etc.

[38] It seems the respondent's submission that there is no debt due because the consent judgment was a mistake is based on the premise that the winding up proceeding is an execution proceeding for the sole purpose of executing

A the so called erroneous consent judgment. The courts has expressed in unequivocal terms a winding up court is not the forum to challenge the validity of a court order or judgment. A winding up court therefore cannot go behind the judgment even if it is irregularly obtained except where there was fraud or illegality involved. Applying this principle alone, the challenge
B mounted by respondent cannot be sustained.

[39] Even if this court were to look for element of fraud or illegality in respect of the consent judgment, based on the affidavit evidence adduced, there is none. For the consent judgment to be set aside respondent must show the judgment was obtained fraudulently or by reason of mutual mistake of
C the parties regarding a material fact: *Au Yuan Chee v. Lim Leong Thaim & Ors* [1956] 2 MC 260. The consent judgment was recorded based on the agreement of both parties after the parties' negotiation, which involved proposals and counter proposals to resolve the claim and defence both parties has against each other. This is fortified by the documents exhibited
D as "CYC 4" in encl. 10. Even if respondent's argument of mistake is accepted, it is a unilateral mistake on its part alone. As far as the petitioner is concerned, the consent judgment is good and enforceable. The affidavit evidence shows the respondent was represented by a legal counsel at all material times in the KLSC suit and this court can only conclude, on the
E facts, the consent judgment was entered into willingly and consciously by the respondent.

[40] Respondent submitted the Sessions Court had seen merits in the respondent's argument (that the consent judgment was entered erroneously) when it ordered the stay of the execution of the consent judgment. On what
F basis such submission was made the respondent did not say. In any event, as winding up proceedings is not an execution process, I am in agreement with the petitioner's argument the winding up court is not concerned with the merits of the consent judgment. As such it does not matter even if respondent had filed a fresh suit to set aside the consent judgment. What
G matters here is the creditor, namely, petitioner pursuing its right to recover the judgment sum from the debtor, namely, respondent pursuant to a notice issued under s. 218 of the Act 125.

[41] The respondent also contended the presumption of respondent's inability to pay its debt does not arise because there is no debt under the
H erroneous consent judgment. It follows therefore, no creditor-debtor relationship between petitioner and respondent. In support of this contention respondent cited *Public Bank Bhd lwn. Search Realty (M) Sdn Bhd* [2001] 1 LNS 272; [2001] 3 MLJ 119. In that case the High Court allowed the respondent's application to strike out the winding up petition presented by
I petitioner bank on the ground it had failed to prove it was a creditor. Apart from notice under s. 218 Act 125, the petitioner bank did not provide any

evidence to show that the respondent was the guarantor of the pecuniary facility granted to the principal debtor (against whom judgment was obtained) and the evidence on the calculation of the amount owed to the said third party. His Lordship Mohd Ghazali H had this to say in his judgment:

> Pada saya, pempetisyen tidak langsung mendedahkan fakta-fakta yang material bagi menyokong petisyen mereka untuk menggulung responden … Apa yang jelas dan tidak dipertikaikan ialah pempetisyen tidak memperolehi penghakiman terhadap responden selaku pengerenti bagi amaun tersebut yang dituntut itu …
>
> Apa yang jelas ialah amaun tersebut yang terdapat dalam notis s. 218 Akta tersebut dan dalam petisyen, yang didakwa dihutang oleh responden, adalah amaun yang berbeza jika dibandingkan dengan hutang penghakiman yang telah diperolehi …
>
> Dalam petisyen ini, pempetisyen belum memperolehi hutang penghakiman terhadap responden bagi amaun tersebut yang mana, jika telah diperolehi sebelum petisyen dikemukakan, akan dengan jelas melayakkan mereka memanggil diri mereka pemiutang. Tanpa keterangan yang menunjuk responden berhutang kepada mereka saya berpendapat petisyen tidak boleh berdiri … .

[42] The facts in the *Public Bank* case clearly shows the petitioner bank, at the time when the winding up petition was presented, was not a creditor of the respondent. Further, the documents adduced before the court there showed the amount demanded by the petitioner was different from the judgment sum obtained by the petitioner bank against the principal debtor. The court ruled if the bank had obtained judgment against the respondent, the bank is a creditor of the respondent and is entitled to initiate the winding up proceedings.

[43] In this instant case, the respondent had obtained a court judgment in respect of the sum demanded and such sum was the same amount stated in the petition. Going along the reasoning of *Public Bank* case the petitioner is, for all intent and purposes a creditor *vis-à-vis* the respondent and the petitioner has every right to initiate winding up proceeding against the respondent regardless what its other motives. As has been decided by the courts time and again, the petitioner cannot be denied of its fruit of litigation. It follows that this court cannot deprive the petitioner from exercising its legal rights to recover the judgment sum it had duly obtained under the consent judgment.

[44] Upon failure of the respondent to pay the judgment sum together with interest of 5% per annum on the said sum from 30 November 2014 to date of full realisation and costs after the expiry of 21 days from 7 April 2015 (27 April 2015), by virtue of s. 218(2)(a) the respondent is deemed insolvent. The onus is on the respondent to rebut that insolvency presumption. To rebut

that presumption the company must show that it is able to pay its debts when it becomes due and payable. The test to be applied to determine its ability to pay is cash flow solvency or commercial solvency test (*Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947). Respondent did not adduced evidence to rebut the insolvency presumption even though it said it is solvent and has financial viability to pay whatever legitimate claims against respondent. Under such circumstances the presumption remains and this winding up court is empowered to exercise its discretionary power to wind up the respondent.

Decision

[45] Premised on the above, I allow the petition on the terms as prayed in the said petition.